IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARGONAUT GREAT CENTRAL INSURANCE COMPANY, Plaintiff,	:	
v.	:	CIVIL ACTION
	:	No. 01-CV-2191
THE PHIL'S TAVERN, INC., t/a, a/k/a PHIL'S TAVERN, CHARLES F. COMPAGNUCCI and LISA S. MANSOR, Defendants.	:	

MEMORANDUM

BUCKWALTER, J. October 29, 2001

Plaintiff Argonaut Great Central Insurance Company ("Argonaut") filed this action against Defendants Phil's Tavern, Inc., t/a, a/k/a Phil's Tavern ("Phil's Tavern"), Charles F. Compagnucci ("Compagnucci"), and Lisa S. Mansor ("Mansor") pursuant to 28 U.S.C. § 2201, seeking a declaratory judgment as to its right to disclaim any duty to defend or indemnify Phil's Tavern or Compagnucci in a lawsuit filed against them by Mansor in the Court of Common Pleas of Montgomery County. Presently before this Court is Plaintiff's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. For the reasons stated below, the Motion is GRANTED.

I. STATEMENT OF FACTS

On December 22, 1998, Mansor, a former waitress and bartender at Phil's Tavern, filed an administrative complaint against her ex-employer, alleging sex and age discrimination during her employment that culminated in her unlawful discharge. Argonaut, which had issued two consecutive policies of commercial general liability insurance to Phil's Tavern in effect during the period in question, was notified of Mansor's administrative complaint on March 1, 1999. Argonaut sent a letter dated March 15, 1999 to Phil's Tavern, addressed to its manager Compagnucci, stating that it was commencing an investigation into the claim and reserving its right to deny coverage at a later date based on, although not limited to, the policy definitions and exclusions detailed in the letter.[1] The letter also stated that "You may wish to consult your own personal attorney at your expense, regarding this matter."

Subsequently, on December 22, 2000, Mansor filed a lawsuit against Phil's Tavern and Compagnucci in the Montgomery County Court of Common Pleas. That lawsuit (the "underlying action") is entitled Lisa S. Mansor v. The Phil's Tavern, Inc., t/a, a/k/a Phil's Tavern and Charles F. Compagnucci, civil action no. 00-08844. In the underlying action's complaint, Mansor alleges that she was harassed and discriminated against based on her age and gender beginning in May 1997, and that on June 28, 1998, she was wrongfully discharged as the result of an unspecified personal matter with a co-employee, all in violation of the Pennsylvania Human Relations Act. In addition, although the complaint does not state a separate claim for defamation, Mansor alleges that false, slanderous and misleading statements made by

1. The record is not clear whether Compagnucci is the owner of Phil's Tavern or merely its manager, although this distinction is irrelevant to the Court's analysis. The parties agree that Compagnucci is an insured under the policy purchased by Phil's Tavern.

Compagnucci and other Phil's Tavern employees damaged her reputation and effectively blacklisted her from similar work in the community. Mansor also seeks to recover punitive damages.

On January 15, 2001, Argonaut received a copy of the complaint in the underlying action. Subsequently, Argonaut sent a letter dated April 27, 2001 to Phil's Tavern and Compagnucci, informing them that it declined insurance coverage to them for the defense or indemnification of the underlying action, pursuant to the specific policy definitions and exclusions detailed in the letter. The correspondence further stated that Argonaut was proceeding to file a declaratory judgment action to confirm its right to withdraw from defense of the underlying action, but that in the interim it would "gratuitously extend a defense" pending adjudication of the declaratory judgment action. The letter concluded by stating that Argonaut's "continued defense will not estop the company from denying defense or indemnity coverage" in the underlying action.

On May 3, 2001, Argonaut filed the present action before this Court, seeking a declaratory judgment as to its right to disclaim any duty to defend or indemnify Phil's Tavern or Compagnucci in the underlying action.

In its Motion for Summary Judgment, Argonaut asserts that it is not required to defend or indemnify Phil's Tavern and Compagnucci with respect to the claims asserted by Mansor because her claims are not covered under the insurance contract. First, the contract obligates Argonaut to indemnify Phil's Tavern for "bodily injury" or "property damage" caused by an "occurrence." However, it asserts, the claims set forth by Mansor are not the result of an "occurrence," which is defined by the policy as an accident. Even if they are, Argonaut alleges,

Mansor's claim does not set forth a claim for either "bodily injury" or "property damage." And finally, it argues, even if any of her claims are considered claims for "bodily injury," they are excluded from coverage under an applicable clause in the contract because they arose "out of and in the course of [Mansor's] employment."

Second, the contract requires Argonaut to indemnify Phil's Tavern for damages as the result of a "personal injury," including "[o]ral or written publication of material that slanders or libels ... or disparages a person's ... goods, products, or services[.]" However, Argonaut argues, Mansor's claims (including her defamation allegations for which no separate count has been pled and for which, it asserts, the statute of limitations has run) are not claims for "personal injury" pursuant to relevant case law.

Third, and most significantly, Argonaut argues that even if the Court rules that Mansor's complaint sets forth either (1) a "bodily injury" caused by an "occurrence," or (2) a "personal injury," coverage for all of her claims is specifically excluded under the contract's Employment-Related Practices Exclusion. That exclusion states that the insurance "does not apply" to "bodily injury" or "personal injury" to a person arising out of any "refusal to employ that person;" "termination of that person's employment;" or "[e]mployment-related practices, policies, acts, or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person ... [w]hether the insured may be liable as an employer or in any other capacity." Argonaut also notes that even if coverage for any particular claim is upheld by the Court, it has no duty to indemnify Phil's Tavern for a claim for punitive damages under the public policy of Pennsylvania.

In their response to Argonaut's Motion for Summary Judgment, Phil's Tavern and Compagnucci apparently concede that Mansor's claims are not covered by Argonaut's insurance policy. They make no argument and cite no case law to meet Argonaut's interpretation and application of the contact provisions to Mansor's claims. Instead, they argue that Argonaut continues to have a duty to defend and perhaps indemnify them in the lawsuit because it (1) waived its right to disclaim coverage, since it knew the nature of the claims against them, assumed their defense, and did not disavow coverage until the filing of this action; and (2) is estopped from disclaiming coverage because they relied on Argonaut's assumption of their defense and will be prejudiced if forced to change counsel.

II. LEGAL STANDARD

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The nonmoving party, however, cannot "rely merely upon bare assertions, conclusory allegations or suspicions" to support its claim. Fireman's Ins. Co. v. Du Fresne, 676 F.2d 965, 969 (3d Cir. 1982). To the contrary, a mere scintilla of evidence in support of the nonmoving party's position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252. Therefore, it is plain that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, "[t]he moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

III. DISCUSSION

A. Waiver

Under Pennsylvania law, in order to establish waiver by an insurer, "the evidence must show that acts of the insurance company constituted a voluntary, intentional relinquishment of a known right and the insurer had full knowledge of all pertinent facts." Wasilko v. Home

Mut. Cas. Co., 232 A.2d 60, 63 (Pa. Super 1967).[2] As a result, "[t]he doctrine of implied waiver is not available to bring within the coverage of an insurance policy, risks that are expressly excluded therefrom." Id. In addition, "a timely reservation of rights letter is valid and prevents the insurer's initial defense of the insured from constituting a waiver of the insured's right to later disclaim liability." Lowenschuss v. Home Ins. Co., No. 90-0554, 1990 U.S. Dist. LEXIS 11375 at *5 (E.D. Pa. Aug. 23, 1990)(citing Draft Sys., Inc. v. Alspach, 756 F.2d 293, 296 (3d Cir. 1985); Federal Ins. Co. v. Susquehanna Broad. Co., 727 F. Supp. 169, 171-172 (M.D. Pa. 1989), amended on other grounds, 738 F. Supp. 896 (M.D. Pa. 1990), aff'd., 928 F.2d 1131 (3d Cir.), cert. denied, 502 U.S. 823 (1991).

In support of their waiver argument, Phil's Tavern and Compagnucci allege that Argonaut knew of the nature of the claims involved, assumed their defense in the underlying action, and "prior to the filing of this action ... did not disavow coverage." However, these assertions no not demonstrate a waiver of Argonaut's rights.

First, Phil's Tavern and Compagnucci utterly fail to point to any evidence that Argonaut voluntarily and intentionally relinquished its right to disclaim coverage, regardless of Argonaut's assumption of their defense. For example, there is no evidence in the record that Argonaut ever accepted coverage. Second, they do not dispute that Argonaut sent two reservation of rights letters to them that prevent Argonaut's assumption of their defense from

2. Argonaut assumes, and Phil's Tavern and Compagnucci do not dispute, that Pennsylvania law applies in this matter.

acting as a waiver.[3] Argonaut's first letter is dated March 15, 1999 – within two weeks of its receipt of Mansor's administrative complaint, and well before the filing of the underlying action. That letter specifically reserved Argonaut's right to deny coverage at a later date based on its investigation of Mansor's claims. Argonaut's second letter is dated April 27, 2001 – about three and a half months after its receipt of the underlying action's complaint. That letter did more than just reserve Argonaut's rights – it informed Phil's Tavern and Compagnucci that Argonaut intended to exercise its right to decline coverage pursuant to the same definitions and exclusions which Argonaut cites in its Motion for Summary Judgment to this Court.

Phil's Tavern and Compagnucci fail to offer any argument or cite any case law to demonstrate why, under these circumstances, the letters sent by Argonaut are not timely and valid reservation of rights letters that "prevent[] the insurer's initial defense of the insured from constituting a waiver of the insured's right to later disclaim liability." Lowenschuss, 1990 U.S. Dist. LEXIS at *5. They have not demonstrated waiver of Argonaut's right to disclaim any duty to defend or indemnify them in the underlying action.

B. Estoppel

Under Pennsylvania law, to find an estoppel, "there must be such conduct on the part of the insurer as would, if the insurer were not estopped, operate as a fraud on some party who has taken or neglected to take some action to his own prejudice in reliance thereon. Accordingly, an insurer is not estopped to deny liability on a policy where the plaintiff was not

3. The Court does not consider Phil's Tavern and Compagnucci's statement that "prior to the filing of this action ... [Argonaut] did not disavow coverage" a denial that they received the April 27, 2001 letter, but merely an assertion that they did not happen to receive or review it before the filing of this suit on May 3, 2001. In either case, however, they do not dispute receiving an initial reservation of rights letter by March 1999 and or that they were informed of a disavowal of coverage by early May 2001.

misled by the [insurer's] conduct." Wasilko, 232 A.2d at 63. See, e.g., Atlantic Mut. Ins. Co. v. Nicoletti Beer Distrib., No. CIV. A. 94-3699, 1995 WL 639823 at *5 (E.D. Pa. Oct. 30, 1995).

Therefore, a party seeking to demonstrate an estoppel must establish the following: (1) an inducement, whether by act, representation, or silence when one ought to speak, that causes one to believe the existence of certain facts; (2) justifiable reliance on that inducement; and (3) prejudice to the one who relies if the inducer is permitted to deny the existence of such facts. Chemical Bank v. Dippolito, 897 F. Supp. 221, 224 (E.D. Pa. 1995) (citing Zivari v. Willis, 611 A.2d 293, 295 (Pa. Super. 1992)). To constitute an inducement, one must "commit an act or forbearance that causes a change in condition resulting in disadvantage to the one induced." Id. The party asserting estoppel must establish these elements by "'clear, precise and unequivocal evidence.'" Id. (quoting Louis W. Epstein Family P'ship v. Kmart Corp., 828 F. Supp. 328, 343 (E.D. Pa. 1993), rev'd on other grounds, 13 F.3d 762 (3d Cir. 1994).

Even viewing the facts in the light most favorable to them, Phil's Tavern and Compagnucci cannot demonstrate any of the estoppel elements. First, Phil's Tavern and Compagnucci were not the victims of inducement. To the contrary, the letters sent to Phil's Tavern and Compagnucci indicate that they were timely informed of Argonaut's positions on coverage and their defense of Mansor's claims. In addition, as early as March 1999, Argonaut suggested they seek the advice of a personal attorney regarding the matter.

Second, in light of this correspondence, Phil's Tavern and Compagnucci could not have reasonably relied upon any act or failure to act of Argonaut's to conclude that Argonaut had accepted coverage or would defend the underlying action (other than doing so while investigating

Mansor's claims or as a gratuity pending the adjudication of this declaratory judgment). Moreover, they fail to indicate precisely how they relied on – or changed their position because of – any alleged inducement.

Third, Phil's Tavern and Compagnucci argue in their brief that they will be prejudiced if required to switch counsel "after this matter has been pending (both at the agency level and in the court) for approximately two years." However, they offer no "clear, precise and unequivocal evidence" – really no competent evidence at all – of any actual prejudice to them. Chemical Bank, 897 F. Supp. at 224. Instead, their argument, without more, is the kind of "unsupported assertions, conclusory allegations, or mere suspicions" they are prohibited from relying upon to defeat summary judgment. Id. at 223. For example, Phil's Tavern and Compagnucci do not state why they would necessarily be required to switch counsel as a result of their assuming their own defense, or explain why such a switch would necessarily be prejudicial.

Finally, Phil's Tavern and Compagnucci cite no case law in support of their estoppel argument. In short, they fail to demonstrate that Argonaut should be estopped from disclaiming any duty to defend or indemnify them in the underlying action.

IV. CONCLUSION

Phil's Tavern and Compagnucci do not challenge Argonaut's conclusion that the claims asserted by Mansor in the underlying action are not covered by their insurance policy. Instead, they claim that Argonaut waived the right to disclaim any duty to defend or indemnify them, and, in the alternative, should be estopped from doing so. However, even viewing the facts in the light most favorable to them, as a matter of law, those defenses cannot succeed on the

record before the Court. Therefore, the Motion for Summary Judgment is granted in favor of Plaintiff Argonaut and against all Defendants.[4]

An appropriate order follows.

4. Mansor has not responded to this Motion. Therefore, summary judgment is appropriate against her as well.

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ORDER

AND NOW, this 29th day of October, 2001, upon consideration of Plaintiff Argonaut Great Central Insurance Company's Motion for Summary Judgment (Docket No. 3) and Defendants Phil's Tavern, Inc., t/a, a/k/a Phil's Tavern and Charles F. Compagnucci's Response Thereto (Docket No. 6), and Plaintiff's Reply (Docket No. 7), it is hereby **ORDERED** that Plaintiff's Motion is **GRANTED**.

Summary judgment is entered in favor of Plaintiff Argonaut Great Central Insurance Company and against Defendants The Phil's Tavern, Inc. t/a, a/k/a Phil's Tavern, Charles F. Compagnucci and Lisa S. Mansor.

This case is **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.